

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALFRED NEWBERRY,
Plaintiff,
v.
FIBERGLASS STRUCTURAL
ENGINEERING, INC., and RANDY
RAPOZA,
Defendants. }
No. C06-742RSL
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS }

I. INTRODUCTION

This matter comes before the Court on “Defendants’ Motion to Dismiss” (Dkt. #10). Defendants assert that they are immune from plaintiff’s defamation and respondeat superior claims because the statement contained in defendant Randy Rapoza’s July 1, 2003 e-mail, upon which plaintiff bases his claims, is covered by both Washington’s and California’s litigation privilege. For the reasons discussed below, the Court grants defendants’ motion and dismisses plaintiff’s claims without prejudice with leave to amend.¹

¹ “In dismissing for failure to state a claim, ‘a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’” Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995) (quoting Cook, Perkiss & Liehe v. N. Cal. Collection Serv., 911 F.2d 242, 247 (9th Cir. 1990)).

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

II. DISCUSSION

A. Background

On May 26, 2006, plaintiff filed a complaint pro se for defamation and respondeat superior against defendants Fiberglass Structural Engineering, Inc. and Randy Rapoza. See Dkt. #1 (Complaint). On August 14, 2006, before any responsive pleading had been filed, plaintiff retained counsel to represent him in this case. See Dkt. #2 (Notice of Appearance). Plaintiff bases his case on a July 1, 2003 e-mail sent from defendant Rapoza to Jeh Moody, the president of Fibertech Engineering. See Dkt. #1 at ¶8. Plaintiff alleges that Fibertech Engineering filed a lawsuit against his company, FEMech, in the Superior Court of California, San Diego County, North County Division, styled: Fiber-Tech Engineering, Inc. v. FEMech (Case No. GIN031249 (2003)). Id. at ¶7. Plaintiff alleges that after the lawsuit in San Diego was filed by Fibertech Engineering, its president, Jeh Moody consulted with defendant Rapoza to analyze a report made by another engineer, Martin Hollman. Id. at ¶8. Plaintiff further alleges that defendant Rapoza responded to Jeh Moody with the following e-mail on July 1, 2003:

Jeh, We have briefly reviewed the materials you provided regarding the FRP Demister and Venturi Scrubber. If there were no additional calculations provided by Femech Engineering then we can generally concur with Martin Hollman's conclusions. Experienced FRP designers are well aware that shear transfer through the core material is a significant issue. It is FSE's standard practice to calculate shear stresses in the core material and to provide an adequate margin of safety. We see no evidence in the reports presented by Femech that core shear stresses were checked or considered. In our opinion this is a serious omission and may well have led to the problems you have experienced. We would expect to review additional materials and to perform an independent analysis in support of this opinion at some point in the future. Regards, Fiberglass Structural Engineering[;] Randal J. Rapoza P.E.[;] Principal Engineer[.]

Id. at ¶8; Ex. 1; Dkt. #11, Ex. A.

Plaintiff alleges that this e-mail by defendant Rapoza, “made the California [Fiber-Tech Engineering, Inc. v. FEMech] lawsuit possible, because under California law, no lawsuit alleging negligence against a licensed engineer may proceed without the expert opinion of an independent engineer stating that the work was negligent.” Dkt. #1 at ¶13. As a result, plaintiff

1 claims that he “suffered enormous harm both in terms of money spent defending himself in the
 2 lawsuit with Fiber-Tech and damage to his professional reputation, all as a direct and proximate
 3 result of the opinion expressed by Defendant Rapoza.” Id. at ¶37. Defendants move for
 4 dismissal without prejudice under Fed R. Civ. P. 12(b)(6) because they claim defendant
 5 Rapoza’s e-mail is covered by both California and Washington absolute immunity law. See Dkt.
 6 #10-2 (Proposed Order).

7 **B. Analysis**

8 **1. Motion to Dismiss Standard**

9 Defendants filed their motion to dismiss under Fed. R. Civ. P. 12(b)(6). In opposition,
 10 plaintiff argues that the motion should be considered a Rule 12(c) motion for judgment on the
 11 pleadings because defendants answered the complaint before filing the motion. See Response at
 12 1.² The Court agrees, but in this case whether the motion is considered under Rule 12(b)(6) or
 13 12(c) is a distinction without difference because the standard remains the same: the Court’s
 14 review is limited to material contained or attached to the complaint, and this material must be
 15 construed in the light most favorable to plaintiff. See Parks Sch. of Bus., Inc. v. Symington, 51
 16 F.3d 1480, 1484 (9th Cir. 1995). The Court also construes the complaint liberally because it
 17 was drafted when plaintiff was proceeding pro se. Wolfe v. Strankman, 392 F.3d 358, 362 (9th
 18 Cir. 2004) (“We construe the complaint liberally because it was drafted by a pro se plaintiff.”)
 19 (citing Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987)). However, the Court notes that
 20 plaintiff retained counsel shortly after the complaint was filed, and that an amended complaint
 21 could have been filed as a matter of course under Fed. R. Civ. P. 15(a) before defendants filed
 22 their motion to dismiss had plaintiff’s counsel thought it prudent to do so.

23 In order to dismiss an action based on an affirmative defense, the complaint must contain

24 _____
 25 ² The Court notes at the outset that the format of plaintiff’s response fails to comply with Local
 26 Civil Rule 10(e). Plaintiff’s counsel is strongly urged to comply with the required pleading format in any
 future filings with the Court. See Appendix A to the Local Civil Rules.

1 allegations on its face showing that the affirmative defense applies. See McCalden v. California
 2 Library Ass'n, 919 F.2d 538, 543 (9th Cir. 1990) ("For a complaint to be dismissed because the
 3 allegations give rise to an affirmative defense 'the defense clearly must appear on the face of the
 4 pleading.'") (citing C. Wright & A. Miller, 5A Federal Practice and Procedure, § 1357, at 348-
 5 49 (2d ed. 1990)). Uncertain what law the Court would apply to the facts of this case, in their
 6 answer and motion, defendants asserted both California's and Washington's absolute litigation
 7 privilege as an affirmative defense to plaintiff's claims.³ While the parties contest whether
 8 California or Washington law applies, the Court does not reach the choice-of-law issue because,
 9 as discussed below, allegations giving rise to the absolute litigation privilege under both
 10 California and Washington law appear on the face of plaintiff's complaint. For clarity, however,
 11 the Court applies California's and Washington's applicable privilege law separately.

12 2. California law

13 Under California Civil Code § 47(b), communications made in or related to judicial
 14 proceedings are immune from tort liability. The privilege "afford[s] litigants and witnesses the
 15 utmost freedom of access to the courts without fear of being harassed subsequently by derivative
 16 tort actions" and "applies to any communication (1) made in judicial or quasi-judicial
 17 proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of
 18 the litigation; and (4) that have some connection or logical relation to the action." Silberg v.
 19 Anderson, 786 P.2d 365, 369 (Cal. 1990) (internal citation omitted). If these requirements are
 20 satisfied, § 47(b)'s privilege is absolute. Id. at 371. A defamation suit may be dismissed under
 21 Cal. Civ. Code § 47 on a Fed. R. Civ. P. 12(b) motion to dismiss. See, e.g., Hagendorf v.
 22 Brown, 699 F.2d 478, 481 (9th Cir. 1983) (affirming Rule 12(b)(6) dismissal of a defamation

23
 24 ³ See Dkt. #8 at 4 ("By way of further answer and affirmative defense defendants allege as
 25 follows: . . . 4. That plaintiff's claims are barred, under both Washington and California law, Cal. Civ.
 26 Code § 47(b), because expert testimony and communication related to judicial proceedings is absolutely
 privileged and defendants are therefore immune from all causes of action stemming from such action[.]").
 ORDER GRANTING DEFENDANTS'

1 action under absolute immunity pursuant to Cal. Civ. Code § 47). In this case, based on the
 2 allegations in the complaint alone, defendants have met their burden of establishing the
 3 preliminary facts justifying application of the affirmative defense of the litigation privilege and
 4 dismissal under Fed R. Civ. P.12(c).

5 First, based on the allegations in the complaint, defendant Rapoza's statement was made
 6 in the context of a judicial proceeding. This first part of the Silberg-test is broad, covering "any
 7 publication required or permitted by law in the course of a judicial proceeding to achieve the
 8 objects of the litigation, even though the publication is made outside the courtroom and no
 9 function of the court or its officers is involved." Silberg, 786 P.2d at 369. In this case, the
 10 allegations in paragraph 13 of the complaint satisfy this requirement: "Defendant Rapoza's
 11 statements made the California lawsuit possible, because under California law, no lawsuit
 12 alleging negligence against a licensed engineer may proceed without the expert opinion of an
 13 independent engineer stating that the work was negligent"⁴ showing that defendant Rapoza's
 14 statement was "required . . . by law in the course of a judicial proceeding to achieve the objects
 15 of the litigation." Id., Dkt. #1, ¶13.

16 Despite this allegation, plaintiff argues that the litigation privilege does not apply because
 17 defendant Rapoza's e-mail was not "made preliminary to a proposed judicial or quasi-judicial
 18 proceeding." See Response at 11 (emphasis in original) (citing Edwards v. Centex Real Estate
 19 Corp., 61 Cal. Rptr. 2d 518, 530 (Cal. Ct. App. 1997)). However, this argument is directly

20
 21 ⁴ Although not referenced in plaintiff's complaint, this requirement is contained in California
 22 Code of Civil Procedure § 411.35. As defendants note in footnote 1 of their reply, dismissal of this case
 23 based on privilege accords with § 411.35, because this section itself contains privilege protection for the
 24 engineer consulted. Id. at § 411.35(e) (stating "an attorney who submits a certificate as required by
 25 paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the . . .
 26 professional engineer . . . consulted and the contents of the consultation. The privilege shall also be held
 by the . . . professional engineer . . . so consulted.") In this case, defendant Rapoza's identity and the
 contents of the June 1, 2003 e-mail were allegedly disclosed because plaintiff was able to match
 statements made in a May 27, 2005 motion in the California action with an earlier e-mail identified as
 being authored by defendant Rapoza. See Dkt. #1 at ¶11.

1 contradicted by paragraph 8 of the complaint, which alleges that litigation had commenced
 2 before defendant Rapoza wrote the June 1, 2003 e-mail. See Dkt. #1, ¶8 (“After the above-
 3 described lawsuit was filed . . . Rapoza, made the statements contained in the email which is
 4 attached hereto as Exhibit 1[.]”) (emphasis added). Although plaintiff claims in a footnote to his
 5 response that the California lawsuit was in fact filed after Rapoza’s e-mail was written, in ruling
 6 on a motion to dismiss a court “cannot consider material outside of the complaint (e.g., those
 7 facts presented in briefs, affidavits, or discovery materials).” See Yoonessi v. Albany Medical
 8 Ctr., 352 F. Supp. 2d 1096, 1098 (C.D. Cal. 2005) (citing Branch v. Tunnell, 14 F.3d 449, 453
 9 (9th Cir. 1994); Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1197 (9th Cir. 1998) (“In
 10 determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the
 11 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s
 12 motion to dismiss.”) (emphasis in original); Response at 2, n.1. Furthermore, Edwards does not
 13 apply to the facts of this case because here there was an actual prior judicial proceeding and
 14 plaintiff alleges that the prior lawsuit was not possible but-for defendant Rapoza’s e-mail. See
 15 Dkt. #1, ¶13 (“Defendant Rapoza’s statements made the California lawsuit possible”).
 16 Therefore, the Edwards decision is distinguishable because it involved an attempt to protect
 17 allegedly fraudulent statements made more than five years before any prior litigation. Edwards,
 18 61 Cal. Rptr. 2d at 522-24.

19 Second, under the Silberg-test, defendants are covered by the litigation privilege as “other
 20 participants authorized by law.” As plaintiff’s complaint alleges, “[d]efendant Rapoza’s
 21 statements made the California lawsuit possible” because they were an “expert opinion of an
 22 independent engineer stating that the work was negligent.” See Dkt. #1 at ¶13. California
 23 courts have extended the privilege to potential expert witnesses. See ITT Telecom Prods. Corp.
 24 v. Dooley, 262 Cal. Rptr. 773, 778 (Cal. Ct. App. 1989) (“[T]he privilege has been extended to
 25 statements made by potential expert witnesses”). Therefore, defendants are the type of judicial-
 26 proceeding participants covered by the litigation privilege.

1 Third and finally, the California Supreme Court has characterized the “objects of the
 2 litigation” element of the Silberg-test as “simply part of the [fourth] requirement that the
 3 communication be connected with, or have some logical relation to, the action, i.e., that it not be
 4 extraneous to the action.” Silberg, 786 P.2d at 374. Here, defendant Rapoza’s e-mail is
 5 connected with the California action and helped “to achieve the object of the litigation” because
 6 plaintiff’s complaint plainly states that defendant Rapoza’s e-mail “made the California lawsuit
 7 possible.” Dkt. #1 at ¶13. For this reason, plaintiff’s citation to Daniel v. Nguyen, 81 Cal. Rptr.
 8 2d 392 (Cal. Ct. App. 1999), is not applicable because not only did the Daniel case involve a
 9 pre-civil litigation demand letter, which is not at issue here, but the court determined that there
 10 was not an adequate “connection” between the pre-litigation statement and the subsequent
 11 litigation. Id. at 398-99. Here, as plaintiff alleged, not only was defendant Rapoza’s statement
 12 connected to the California litigation, it allowed the case to proceed.

13 In his response, plaintiff repeatedly asserts that defendant Rapoza’s e-mail is not covered
 14 by the privilege because the defendants did not know the e-mail formed the basis of the
 15 California litigation. See, e.g., Response at 14 (“There has simply been no allegation made in
 16 this case by either party that Rapoza or FSE themselves actually contemplated prospective
 17 litigation or understood that the person Rapoza gave his opinion to actually contemplated
 18 prospective litigation.”). Under California law, however, defendant Rapoza’s knowledge is not
 19 germane for purposes of applying the privilege to his June 1, 2003 e-mail. See Financial Corp.
 20 of Amer. v. Wilburn, 234 Cal. Rptr. 653, 659-60 (Cal. Ct. App. 1987) (“Plaintiffs’ premise is
 21 that the subjective intent, purpose, or knowledge of a writer can destroy the privileged status of
 22 otherwise privileged statements. The law is otherwise. . . . Courts respect the absolute aspect of
 23 the privilege by considering a statement’s apparent or ostensible connection to the underlying
 24 action, without exploring the writer’s actual, subjective intent or purpose.”); Silberg, 786 P.2d at
 25 374 (“The ‘furtherance’ requirement was never intended as a test of the participant’s motives,
 26 morals, ethics or intent.”); Rothman v. Jackson, 57 Cal. Rptr. 2d 284, 288 (Cal. Ct. App. 1996)

1 (“The high court has specifically disapproved any interpretation of the ‘furtherance’ requirement
 2 as a test of the motives, morals, ethics or intent of the person claiming the privilege.”).

3 For these reasons, based on the facts as alleged in the complaint, defendant Rapoza’s e-
 4 mail is privileged under California Civil Code §47(b) and Silberg. Rather than determine a fact-
 5 specific choice-of-law issue at this stage of the proceedings, as discussed below, the Court
 6 concludes that based on the allegations in the complaint, plaintiff’s claims should be dismissed
 7 because defendants are also immune under Washington’s common-law witness immunity
 8 doctrine.

9 **3. Washington law**

10 In Washington, “absolute immunity extends to acts or statements of experts which arise
 11 in the course of or preliminary to judicial proceedings.” Bruce v. Byrne-Stevens & Assocs.
 12 Eng’rs, Inc., 113 Wn.2d 123, 137 (1989). Where the absolute immunity doctrine applies, it
 13 justifies dismissal of an action. Id. at 125 (affirming the trial court’s dismissal).

14 In this case, Washington’s absolute immunity doctrine extends to defendant Rapoza’s e-
 15 mail because as alleged in the complaint, the e-mail was the statement of an expert arising in the
 16 course of a judicial proceeding. Plaintiff’s complaint characterizes the e-mail as a statement of
 17 an expert, alleging that: “In the expert opinion which forms the basis of Count 1 [Defamation]
 18 of this Complaint, Defendant Rapoza falsely accuses Plaintiff of negligence in the design of the
 19 FRP Demister and Venturi Scrubber” and “Defendant Rapoza’s statements made the California
 20 lawsuit possible, because under California law, no lawsuit alleging negligence against a licensed
 21 engineer may proceed without the expert opinion of an independent engineer[.]” See Dkt. #1 at
 22 ¶¶ 19, 13 (emphasis added). This last statement is a definitive allegation by plaintiff that the
 23 defendant Rapoza’s e-mail arose the context of a judicial proceeding.

24 Under Cal. Code Civ. P. § 411.35, as part of a negligence action against a professional
 25 engineer, the plaintiff’s attorney must file a certificate of merit stating that “there is a reasonable
 26 ORDER GRANTING DEFENDANTS’
 MOTION TO DISMISS

1 and meritorious cause" for filing the action. This certificate must contain a declaration that the
 2 attorney consulted with a professional engineer, and the "person consulted shall render his
 3 opinion that the named defendant or cross-defendant was negligent or was not negligent in the
 4 performance of the applicable professional services." Id. at § 411.35(b)(1). Plaintiff's
 5 complaint alleges that defendant Rapoza's statement satisfied this requirement by making "the
 6 California lawsuit possible." Dkt. #1 at ¶13. Based on this allegation, plaintiff cannot
 7 reasonably assert in his response to the motion to dismiss that the June 1, 2003 e-mail was not
 8 part of "the course of or preliminary to a judicial proceeding."

9 Plaintiff attempts to avoid the holding from Bruce cited above by quoting other language
 10 from the opinion. Plaintiff argues that "any doubt that Bruce does not protect Rapoza or FSE in
 11 this case is removed by the Bruce Court itself:

12 Respondents and amicus argue that Byrne-Stevens should not be shielded from
 13 liability merely because its calculations were later used in court. If the issue is
stated that way, we agree; but that is not the issue before us. We do not hold that
 14 any professional negligence is immunized whenever an expert later relies on it in
 15 court. In accord with existing law, we hold only that absolute immunity extends to
 16 acts and statements of experts which arise in the course of or preliminary to
 17 judicial proceedings.

18 Response at 7 (emphasis by plaintiff) (citing Bruce, 113 Wn.2d at 136-37). The quote from
 19 Bruce emphasized by plaintiff, however, is not at issue here based on the allegations in the
 20 complaint because the inclusion of the June 1, 2003 e-mail in the California action was not an
 21 attempt by defendant Rapoza to immunize some prior act of professional negligence. See Reply
 22 at 11 ("Defendants do not argue that Mr. Rapoza's opinion is protected or that Defendants are
 23 immune from suit because the opinion was later used in court. Rather Defendants argue that the
 24 opinion is protected and Defendants are immune because California required the opinion in
 25 order for the plaintiff to pursue litigation, making it a statement made preliminary to a judicial
 26 proceeding."). Therefore, contrary to plaintiff's assertion, his emphasized portion of the Bruce
 opinion does not remove defendant Rapoza's e-mail from the scope of Washington's absolute

1 immunity doctrine.

2 Plaintiff also attempts to distinguish defendants' citation to Middlesex Concrete Prods. &
 3 Excavating Corp. v. Carteret Indus. Ass'n, 68 N.J. Super. 85, 172 A.2d 22 (1961), by stating that
 4 in this case "the lawsuit had not been filed" prior to defendant Rapoza's e-mail. As discussed
 5 above, however, the complaint expressly states the California lawsuit was filed prior to
 6 defendant Rapoza's e-mail and on a motion to dismiss the Court's review is limited to the
 7 allegations contained on the face of the complaint. See Dkt. #1 at ¶8. And, even if the e-mail at
 8 issue was authored before the complaint was filed, it is intimately connected with the Fiber-Tech
 9 Engineering, Inc. v. FEMech proceeding as part of Cal. Code. Civ. P. § 411.35's certificate of
 10 merit requirement.

11 Finally, plaintiff cites part of a sentence from Deatherage v. Examining Bd. of
 12 Psychology, 134 Wn.2d 131 (1997), for the proposition that a witness must be "testifying"
 13 before the privilege applies. See Response at 6 ("Deatherage makes clear that the privilege is
 14 only applicable to 'communications preliminary to a proposed judicial proceeding or as part of a
 15 judicial proceeding in which he is testifying" (emphasis by plaintiff) (quoting Deatherage, 134
 16 Wn.2d at 135). First, the cited quotation from Deatherage was not authored by the Washington
 17 Supreme Court itself, but rather it is from the Court's quotation of the Restatement (Second) of
 18 Torts § 588. Second, in discussing § 588, the Deatherage court explained that while "[t]his
 19 court's early application of the privilege was consistent with the Restatement," "[i]n 1989, the
 20 privilege was extended, and we held an expert witness cannot be found civilly liable for any
 21 action done as part of a judicial function." Id. at 135-36 (citing its 1989 Bruce decision).
 22 Accordingly, the Washington Supreme Court has not held that the privilege applies only to
 23 testifying experts. Rather, as they reiterated in Deatherage, the privilege applies to "any action
 24 done as part of a judicial function." Id. at 136. Here, the privilege applies because as plaintiff
 25 alleged, defendant Rapoza's e-mail served a judicial function since it formed the basis for the
 26

1 Cal. Code. Civ. P. § 411.35 certificate in the Fiber-Tech Engineering, Inc. v. FEMech case.

2 Washington's “[w]itness immunity is premised on the chilling effect of the threat of
3 subsequent litigation” and “[u]nless the whole, integral enterprise falls within the scope of
4 immunity, the chilling effect of threatened litigation will result in . . . adverse effects . . .
5 regardless of the immunity shielding the courtroom testimony.” Bruce, 113 Wn.2d at 132, 135.
6 Based on the allegations in the complaint, dismissal of plaintiff's claims adheres to this policy
7 supporting Washington's immunity doctrine.

8 **III. CONCLUSION**

9 For all of the foregoing reasons, “Defendants’ Motion to Dismiss” (Dkt. #10) is
10 GRANTED and plaintiff’s claims are DISMISSED WITHOUT PREJUDICE with leave to
11 amend.

12
13 DATED this 5th day of February, 2007.

14
15 
16 Robert S. Lasnik
17 United States District Judge